No. 16135

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. D. MacKay,

Appellant,

vs.

American Potash & Chemical Co., Inc., a corporation, and Stauffer Chemical Company, a corporation,

Appellees.

Answering Brief of Appellee American Potash & Chemical Co., Inc.

Gibson, Dunn & Crutcher,
Martin E. Whelan, Jr.,
634 South Spring Street,
Los Angeles 14, California,
Attorneys for Respondent American Potash & Chemical Co., Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 16135

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. D. MacKay,

Appellant,

vs.

American Potash & Chemical Co., Inc., a corporation, and Stauffer Chemical Company, a corporation,

Appellees.

Answering Brief of Appellee American Potash & Chemical Co., Inc.

Jurisdiction.

Because the appellant's Statement of Jurisdiction in his Opening Brief does not show the basis for the jurisdiction of the Trial Court, and indeed would purport to negate that jurisdiction, it is felt necessary for the assistance of the court to set forth the basis of jurisdiction in this matter.

The action was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, and was timely removed to the United States District Court, Southern District of California [R. 3-14]. The Petition for Removal, together with the Complaint, demonstrated:

(1) The only real defendants as of the date of commencement of the action were American Potash & Chemical Co., Inc. (hereinafter referred to as "Potash") and Stauffer Chemical Company (hereinafter referred to as "Stauffer"), both citizens and residents of the State of Delaware. West End Chemical Co., named in the Complaint as a defendant, was merged into Stauffer Chemical Company prior to the commencement of this action and Stauffer succeeded to all of its assets and liabilities;

(2) Plaintiff was at the time a citizen and resident of the State of California;

(3) The Complaint prayed for damages in excess of Three Thousand Dollars [R. 3-14]. The United States District Court accordingly had jurisdiction under Title 28 U. S. C., Sections 1332 and 1441.

The jurisdction of this court is derived from Title 28 U. S. C., Section 1291.

Statement of the Case.

A. Sequence of Events.

This action was commenced in the state Superior Court on or about July 10, 1957 [R. 4]. It was removed to the United States District Court, Southern District of California on August 2, 1957 [R. 3-10]. Thereafter Answers were filed by Potash and Stauffer and certain pre-trial proceedings were had [R. 15-28, 29, 30, 38, 78, 81, 96, 107, 116-130].

On January 3, 1958 Motion for Summary Judgment and Notice of Motion were filed on behalf of both defendants herein [R. 70-73], along with proposed Findings of Fact and Conclusions of Law and Proposed Judgment [R. 74-77].

Previously thereto, on December 20, 1957, Interrogatories had been served by defendants on plaintiff and filed [R. 31-38]. The Motion for Summary Judgment specifically stated that it relied upon the Answers to be filed to those Interrogatories, as well as the Affidavits of Robert B. Coons, George Ellis, J. H. Gunz, W. M. Jacobs and William Spalding, all filed with said Motion for Summary Judgment [R. 72, 48, 47, 39, 44, 51]. Plaintiff's Answers to defendants' Interrogatories were filed on February 17, 1958 [R. 83-96]. Defendants anticipated the nature of those Answers, because of the results of plaintiff's deposition previously taken in perpetuation proceedings in the state court after plaintiff had instituted his own perpetuation proceedings.

The Motion for Summary Judgment was noticed for January 13, 1958 [R. 73]. As of December 16, 1957, Attorney Gerald H. Gottlieb was substituted in the place of plaintiff, who was *In Pro. Per.* until that time. On January 13, 1958, the hearing on the Summary Judgment Motion was continued, at the request of plaintiff's counsel to January 27, 1958 [R. 78]. As of January 27, 1958, Mr. Gottlieb withdrew from the case and plaintiff was substituted again *In Pro. Per.* on the record [R. 77]. On Motion of plaintiff, the hearing was continued on January 27, 1958, to February 17, 1958 [R. 78-81], to permit plaintiff to obtain counsel [R. 117-118].

On February 17, 1958, plaintiff again requested a continuance because he wished to retain counsel, had been unsuccessful in procuring counsel, and wished to have time to institute any discovery proceedings deemed necessary to oppose the Motion for Summary Judgment [R. 82-83]. The hearing on the Motion was thereupon continued to

March 17, 1958 [R. 96-97]. At that time the following colloquy occurred:

> "The Court: The record shows, Mr. MacKay, that you came into court 10/7/57, on pretrial. It was then continued to 11/18. That was practically six weeks. Then on the 18th you came in and it was continued to 12/16, another [17] month. Then on 12/16 we have a motion to dismiss and on 12/16 the matter was continued to 1/13. On 1/13 it was continued to 1/27. On 1/27 continued to 2/17. So we have had continuances continuously from 10/7 to 2/17. That is about four months.
>
> "The Court: I am going to continue this matter to March 17th and there will not be any more continuances.
>
> "Mr. Whelan: May I ask that Mr. MacKay be specifically instructed that his attorney should be prepared to argue the motion on that day and not simply come in and ask for a further continuance.
>
> "The Court: Mr. MacKay, tell your attorney there will be no more continuances. I am going to rule on that day on the motion to dismiss.
>
> "Mr. Waiss: And also the motion for summary judgment.
>
> "The Court: Yes" [R. 124-125].

On March 11, 1958, plaintiff filed his affidavit in opposition to the Motion for Summary Judgment, a motion to strike portions of the affidavits filed in support of the Motion for Summary Judgment, and a motion for further continuance. On March 17, 1958, the Motion for Summary Judgment was granted [R. 107-108]. Plaintiff had taken no steps to institute dscovery proceedings. Findings of Fact and Conclusions of Law and Summary Judgment were served, signed and filed [R. 108-114].

While plaintiff on the record was acting *In Pro. Per.* some of the time, he in reality was represented by counsel advising him behind the scenes at all significant times [R. 122, 127]. As plaintiff himself stated at the hearing of February 17, 1958:

> "* * * I have had advice of counsel, of three attorneys, in the proceedings.
>
> "* * * I have had legal advice all the way through this proceeding right from the start * * *" [R. 122].

And at the hearing on March 17, 1958, at which the Court ordered Summary Judgment, plaintiff stated:

> "* * * Well, Your Honor, assuming, of course, that you have studied and read the documents that have been filed in reply to the motions of the defendants in this action, I am sure you appreciate the fact that I have employed legal counsel" [R. 127].

B. The Basis for the Motion for Summary Judgment.

In his Complaint, plaintiff alleged:

(1) That plaintiff and defendants mutually agreed that plaintiff should serve the defendants in securing natural gas service for their plants in the area of Trona, California, and that plaintiff be compensated in a reasonable amount, "if the plaintiff secured said natural gas service";

(2) "As a result of plaintiff's services and efforts," defendants procured such natural gas service; and

(3) Plaintiff's alleged entitlement to remuneration. Defendants' Answers denied the existence of any such agreement with plaintiff and denied that natural gas service was procured through plaintiff's services or efforts, although admitting, of course, that they did obtain natural gas service [R. 15-29].

Although defendants knew that there was no such agreement, obviously a Motion for Summary Judgment would fail on this ground since plaintiff was relying on asserted oral conversations. However, plaintiff's deposition in the previous perpetuation of testimony proceeding in the state court demonstrated that there was no connection between anything he assertedly did and the obtaining of natural gas service by defendants. The Motion for Summary Judgment was predicated on this ground only.

Plaintiff, in his Brief, has tried to cast doubt on whether the Trial Court actually granted the Motion for Summary Judgment, or a Motion to Dismiss, also pending. This attempt of plaintiff, in view of the Trial Court's specific ruling [R. 107-108], and the written findings, conclusions and summary judgment [R. 108-114] demonstrates plaintiff's own feeling of distress on this appeal. The Motion to Dismiss was not ruled on by the Trial Court, and there is no statute of limitations question before this Court.

Plaintiff's consciousness of distress is further revealed by this erroneous statement at page 5 of his Brief:

> "* * * Appellant earnestly requests the Court to examine appellees' affidavits (*the only evidence* supporting the findings of fact) * * *."

What plaintiff *at any stage* fails to *mention,* much less discuss, are his Answers to Written Interrogatories, which *alone* completely establish the lack of any connection with anything he did, if anything was done by him, and the obtaining of natural gas service by defendants for their Trona plants [R. 83-96].

There are certain other inaccuracies in plaintiff's Statement of Facts which will not be dwelled upon because not material to this appeal.

Summary of the Argument.

(a) There is no triable issue of fact in that the supporting papers filed with the Motion for Summary Judgment conclusively show that there is no evidence, and that plaintiff has none, establishing a connection between what he claims to have done and the eventual obtaining of natural gas service by the defendants. Plaintiff's Answers to Written Interrogatories propounded to him alone show conclusively that there is no such connection, and that he has no evidence thereof.

(b) Plaintiff's attack on defendants' affidavits is of no consequence. Clearly the portion of the affidavit of William F. Spalding quoting plaintiff's testimony in perpetuation of testimony proceedings is proper. The remaining affidavits merely confirm what the plaintiff himself has admitted in his Answers to the Written Interrogatories.

(c) Plaintiff cannot complain that the Trial Court did not give him every opportunity to institute discovery proceedings. On the contrary, he had numerous such opportunities, failed to even institute any, and refused an offer of the court at the time of the hearing whereat the Motion for Summary Judgment was granted.

Argument.

A. No Triable Issue Remains.

Considering the Motion for Summary Judgment in connection only with plaintiff's Answers to Written Interrogatories, the propriety of the Summary Judgment is established. Plaintiff's testimony in the perpetuation of testimony proceedings in the state court quoted in part in the Affidavit of William F. Spalding, conclusively demonstrates the propriety thereof. The remaining affidavits are confirmatory that plaintiff did nothing having any causative connection with the procurement of natural gas service.

From plaintiff's Complaint, previously paraphrased and quoted, it is clear that he was to obtain no compensation unless he was the procuring cause of defendants obtaining natural gas service [R. 10-14].

Assuming for the sake of argument that there was any agreement with plaintiff, it is clear from his testimony in the state court perpetuation proceedings that he had no broader understanding of his alleged rights. This testimony is quoted in the Affidavit of William F. Spalding [R. 69]:

> "Q. Do I understand, then, that you told Mr. Minister that whether or not you would get any compensation would depend on whether or not you obtained gas for Trona? A. Absolutely I told him. we discussed the fact that I was willing to take that risk; that if we failed I would simply be out and that was all there was to it.
>
> Q. If you got gas you would expect compensation; but if you did not get gas you would not expect compensation? A. That is absolutely correct."

That an agent who is hired to procure a specified result is entitled to compensation only if he procures that result is well established by the authorities:

Fitzpatrick v. Underwood (1941), 17 Cal. 2d 722, 733, 734;

Hill v. Knight (1930), 209 Cal. 14;

Roth v. Thomson (1919), 40 Cal. App. 208, 215;

American Law Institute, Restatement of Agency, Sec. 448;

Compensation; Agent as Effective Cause, Sec. 448.

"An agent whose compensation is conditional upon his accomplishment of a specified result is entitled to the agreed compensation if, and only if, he is the effective cause of accomplishing the result."

Restatement of Agency, Sec. 448.

In the Answer to the Interrogatories directed to plaintiff, he stated in substance as follows:

(1) At no time on or before April 11, 1955 (the date of the agreements with Pacific Gas & Electric Company whereby defendants obtained natural gas service), or between April 11, 1955 and October 1, 1955 (the date of approval of said agreements by the California Public Utilities Commission) did plaintiff have any contact *of any kind* with any one connected with Pacific Gas & Electric Company *in any way* relating to the furnishing of natural gas service to the area of Trona, California, or to any plant of either defendant in that area [R. 84-85];

(2) With the exceptions hereafter noted, plaintiff neither knows of, *nor has any information* that any one other than officers or full time employees of Potash, Stauffer (then West End Chemical Company) and Pacific

Gas & Electric Company had anything to do with interesting the latter in furnishing natural gas service to either the general area of and around Trona or to either of defendants' plants. The exceptions were Mr. Minister and Mr. Alliman, both Navy representatives interested in procuring natural gas service for Navy facilities in the area [R. 86-92]. According to the Answers to the Interrogatories, their efforts commenced before plaintiff's alleged agreement with defendants [R. 86-91];

(3) Plaintiff neither participated in the hearings of the California Public Utilities Commission, pursuant to which defendants' agreements with Pacific Gas & Electric Company were approved, nor does he recall any communication with any one connected with the Public Utilities Commission with reference to the furnishing of natural gas to the Trona area, or to defendants' plants. If he had any such communication it had no relationship to attempting to obtain Public Utilities Commission approval [R. 92-95].

That Answers to the Written Interrogatories are a proper basis for awarding Summary Judgment is, of course, clear:

American Airlines v. Ulen (D. C. Cir., 1949), 186 F. 2d 529, 531-532;

Munoz v. Merchant's Nat. Bank of Allentown (D. E. D. Pa., 1943), 49 Fed. Supp. 588, 589-591;

6 *Moore's Federal Practice,* Sec. 5611 [5], pp. 2078-2080, and cases cited.

We take no quarrel with the rule that a Summary Judgment can only be granted where there is no material issue of fact, and that the function of such a proceeding is not

to determine how that issue should be decided. We likewise take no quarrel with the rule that the general test is whether under the various papers presented, the moving party would be entitled to a directed verdict. These rules are amply demonstrated by the plaintiff by the cases cited at pages 5 and 6 of his Opening Brief. We would be remiss if we did not point out that 6 of the 7 cases so cited affirmed the granting of summary judgments. We would likewise be remiss if we did not point out that those cases also stand for the proposition that a defendant is entitled to summary judgment if there is no triable issue as to some one issue on which the plaintiff must prevail if he is to establish a cause, although there are triable issues of fact as to other elements of the cause of action. Thus, assuming for the sake of argument that plaintiff could establish some sort of a contract with defendants, defendants would be entitled to a directed verdict if plaintiff were unable to show any connection between anything he assertedly did and the eventual obtaining of natural gas service by defendants. The case which plaintiff purportedly cites to the contrary at page 6 of his Brief (*Albert v. Brownell* (9th Cir., 1954), 219 F. 2d 602) was one wherein Summary Judgment could not be obtained because there was a triable issue concerning whether the District Court had any jurisdiction. Obviously, where there is such an issue a Summary Judgment could not be granted.

We shall hereafter show that in neither the plaintiff's pleading nor in his affidavit in opposition to the Motion for Summary Judgment does he raise any triable issue of fact concerning any relationship between any of his alleged services and the obtaining of natural gas service by either defendant. It is clear from the Answers to the In-

terrogatories that he has neither evidence nor information upon which he could carry the case to the trier of fact in the event of a trial as to this issue. As stated in *Munoz v. Merchants Nat. Bank of Allentown* (D. E. D. Pa., 1943), 49 Fed. Supp. 588, wherein plaintiff's Answers to his Interrogatories demonstrated that he had no evidence on an essential issue of his Complaint:

> "* * * when specific answers to interrogatories refute broad general allegations of a complaint, the former paint the picture which the court should view in disposing of a motion for summary judgment. * * *" (p. 590).
>
> "* * * unless plaintiff really has knowledge of some facts or information which supports her broad allegations, a trial is not warranted. Her answers to the interrogatories disclose that she has no such knowledge. Under all the pleadings, including the answers to the interrogatories, there appear to be no genuine issues as to material facts" (590-591).

Likewise, in this case plaintiff has no possible evidence upon which to proceed to trial on an essential issue which he must sustain before he can have any recovery. The action was removed to the Federal Court in early August of 1957. Plaintiff, according to his own statement, had legal advice all the time, yet he commenced no discovery proceedings at any time. The Motion for Summary Judgment was filed on January 3, 1958, as before stated, and numerous continuances were had until March 17, 1958. Despite the fact that the last continuance obtained had been requested partially for the purpose of commencing any necessary discovery [R. 83], and despite the fact that plaintiff was there warned by the court that no further continuances would be given [R. 125],

nonetheless, at the hearing on March 17, the Trial Court offered the plaintiff a further continuance for the purpose of commencing discovery on condition that he pay to defendant Stauffer the sum of $500.00. This condition was imposed because of the expense occasioned to that defendant by reason of the numerous trips from San Francisco required of its attorney by the constant continuances requested by and on behalf of plaintiff [R. 128-129]. Plaintiff refused to avail himself of this offer, just as he had refused to avail himself of the long time interval which he had to commence discovery. This time interval is in stark contrast and contradiction to plaintiff's assertion in his affidavit in opposition to Motion for Summary Judgment that he had not yet taken depositions of persons whose affidavits were submitted in support of the motion since he had no reason to believe that they would state what they averred [R. 99]. This despite the fact that these affidavits in support of the motion had been on file since January 3, 1958, and plaintiff's said affidavit was filed on March 11, 1958.

It appears clear in considering the Answers to the Interrogatories and the plaintiff's unused opportunities for discovery, that he has no hope of producing any evidence on the essential issue of his case which was attacked by the Motion for Summary Judgment. As stated in the cases, a party may not avoid Summary Judgment on the ground that if he is allowed to go to trial he may somehow produce a triable issue of fact. See:

Radio City Music Hall Corp. v. United States (2d Cir. 1943), 135 F. 2d 715, 718;

Garcia v. United States (U. S. Ct. of Claims, 1952), 108 Fed. Supp. 608, 613.

As stated in 6 *Moore's Federal Practice,* paragraph 56.15[3], page 2129:

> "Nor is an opposing party, who has no countervailing evidence and who cannot show that any will be available at the trial, entitled to a denial of the motion for summary judgment on the basis of a hope that such evidence will develop at the trial."

Before turning to the affidavit of plaintiff in opposition to the motion for summary judgment—the only such affidavit filed on his behalf—we wish to point out several legal rules applicable to summary judgment motions:

General allegations in a pleading which do not set forth facts in detail and with precision are insufficient to prevent the award of summary judgment.

> *Suckow Borax Mines Consol. v. Borax Consolidated* (9th Cir., 1950), 185 F. 2d 196, 205, cert. den. 340 U. S. 946, reh. den. 341 U. S. 912;
>
> *Lindsey v. Leavy* (9th Cir. 1945), 149 F. 2d 899, 902.

Similarly, affidavits in opposition to a Motion for Summary Judgment must comply with Rule 56(e) of the Federal Rules of Civil Procedure. Accordingly mere denials or conclusions do not raise triable issues of fact.

> *Suckow Borax Mines Consol. v. Borax Consolidated, supra,* p. 206;
>
> *Piantadosi v. Loew's, Inc.* (9th Cir. 1943), 137 F. 2d 534, 536;
>
> *Engl v. Aetna Life Ins. Co.* (2d Cir. 1943), 139 F. 2d 469, 472-473 (and numerous cases cited therein).

Plaintiff's Complaint consists only of a general allegation that defendants procured natural gas service, "* * *

as a result of plaintiff's services and efforts" [R. 12], obviously a conclusionary allegation and not one of evidentiary facts within Rule 56(e) and the above cases. His affidavit in opposition to the Motion for Summary Judgment [R. 97-99]—the only one filed in opposition—is equally insufficient. Therein, plaintiff states:

> "That to the best of his knowledge and belief, he induced, effected and set in motion the chain of events that directly and proximately culminated in the contract between PG&E and defendants."

Not only does this assertion have the same conclusionary failing, and fail to state any evidentiary facts, but on its face it contradicts the specific lack of any knowledge or information revealed by plaintiff's Answers to the Written Interrogatories, and is obviously sham.

Plaintiff's affidavit states: "That he demonstrated the feasibility and desirability of gas service to the subject defendants, to the representatives of the Southern California Gas Company in the fall of 1952" [R. 98]. Apart from its conclusionary nature, in that plaintiff does not describe what he did or what he said, defendants procured their natural gas service from PG&E in 1955, and not from Southern California Gas Company.

Plaintiff's affidavit further states that, "to the best of his knowledge and belief PG&E had never been interested in servicing the defendants," [R. 98]. Apart from the immateriality of this assertion, plaintiff's Answers to the Interrogatories demonstrate that his "best knowledge and belief" in this matter is none at all, since he never talked to any one from PG&E on the subject [R. 83-96].

The further assertion in his affidavit that plaintiff offered to contact PG&E personnel, but that representa-

tives of defendants and "the Pacific Lighting Group" [Southern California Gas Company] said they would do this obviously shows no activity on plaintiff's part leading to the furnishing of natural gas service, but demonstrates the contrary. And it was admitted by plaintiff that his alleged agreement with defendants was not exclusive of their right to seek to obtain gas service for themselves. As stated by plaintiff in the perpetuation of testimony proceedings in the state court:

> "A. I want to put that in the record to make it a matter of record that I am giving Mr. Norman Sutherland's name, who is now president of the PG&E Company and the man who signed the contract later, so if they want to make an investigation as to whether or not Mr. Coons was doing some work on the side on this deal unbekownst to me, that that is a fact.
>
> Q. You think Mr. Coons wasn't supposed to be doing anything? A. I didn't deny him that right but I was led to believe all the time that I was handling this situation, [115] *but that was not exclusive.* There would *be no objection on my part, anything he wanted to do* * * *" [Affidavit of William F. Spalding, R. 69-70]. (Emphasis added.)

At the time of the hearing of the Motion for Summary Judgment plaintiff for some reason which was never explained objected to the quoting of his testimony in the prior state court perpetuation proceedings. We are unable to see how one may object to the use of his transcribed admissions when he does not deign to contradict them and, when they are filed in an affidavit. Plaintiff stated that the Motion for Summary Judgment did not specify that it would rely on this material. To the contrary, it specified that it would rely on the affidavits filed concurrently

therewith and the Affidavit of Mr. Spalding, containing the extracts of plaintiff's testimony so quoted, was filed therewith [R. 70]. The remaining affidavits filed in support of the Motion for Summary Judgment [R. 39, 44, 47, 48] fully confirm what plaintiff himself admits in his Answers to his interrogatories—that he has no evidence, nor does he know of any which he can obtain on an essential issue to his case.

B. Plaintiff's Attack on Defendants' Affidavits.

One of the issues presented by plaintiff is the sufficiency of the affidavits offered in support of the Motion for Summary Judgment. As above stated, the Summary Judgment is completely and fully supported by plaintiff's Answers to the Written Interrogatories served on him, and in any event by such Answers in connection with his own testimony, quoted in the Affidavit of William F. Spalding, given in the proceedings to perpetuate plaintiff's testimony in the state court. As above stated, what possible objection plaintiff can have to the use of his own admissions taken by a court reporter and filed in this action in affidavit form, is difficult to understand where he has not even sought to deny or qualify such testimony. Since the remaining affidavits are merely confirmatory that PG&E did not furnish natural gas service to defendants because of any alleged services of plaintiff, we think it unnecessary to expand this Brief by treating specifically with those affidavits individually and plaintiff's objections thereto.

C. Plaintiff Had Every Opportunity to Exhaust Discovery and Refused a Valid Conditional Offer of the Trial Court for Even Further Time.

We have heretofore set out the time sequence involved which shows that plaintiff had some eight months in which to commence any discovery which he was going to commence. We are speaking of the period from the removal of the action to the granting of the Summary Judgment. The Motion for Summary Judgment and the supporting affidavits were filed on January 3, 1958, which gave the plaintiff approximately two and one-half months in which to at least show some good faith effort in instituting discovery, if any were to be instituted. The record shows that on January 27, 1958, plaintiff made a Motion for Continuance of the hearing scheduled for that date, one of the grounds being to permit time to exhaust proper discovery procedures [R. 79-80]. The continuance was given until February 17, 1958 [R. 78-79, 81]. The record also shows that on the 13th day of February 1958, plaintiff filed an affidavit in support of a Motion for Further Continuance, again stating as one of the grounds the exhaustion of any necessary discovery procedures prior to the hearing of the Motion for Summary Judgment [R. 82-83]. The Court gave a further continuance until March 17, 1958 [R. 96-97], at the same time fully warning the plaintiff that it intended to rule on the motions before the court on March 17 [R. 125]. Nevertheless, plaintiff never noticed any depositions, and on March 11, 1958 filed a Motion for Continuance of the hearing of the Motion for Summary Judgment, stating that he desired to take the depositions of certain persons [R. 104-106]. In his affidavit in opposition to the Motion for Summary Judgment filed on the same date [R. 97-99] plaintiff had the audacity to state that he had not yet taken the depo-

sitions of Messrs. Jacobs and Gumz because he had no reason to believe that they would make the statements which they had made in their affidavits filed in support of the Motion for Summary Judgment. This despite the fact that such affidavits had been on file since January 3 of the same year. At the hearing the court offered, as above stated, to grant the requested continuance, provided the plaintiff pay to defendant Stauffer the sum of $500.00 to reimburse it for the necessary trips of its counsel from San Francisco occasioned by plaintiff's numerous requested continuances [R. 128-129]. The plaintiff stated, "I would prefer to spend that money on an appeal . . ." [R. 129]. Certainly, in view of this record, plaintiff cannot claim now any abuse of discretion.

Conclusion.

The foregoing conclusively demonstrates that plaintiff neither has, nor is informed of, any possible evidence which he might introduce on an essential factor of his case—he does not have any connecting link between what he asserts he did and the fact that the defendants procured natural gas service for their plants in the Trona, California area. Plaintiff's Answers to Interrogatories show that he could not even make out a *prima facie* case if a trial were to be had. As stated in *Orvis v. Brickman* (D. D. C., 1951), 95 Fed. Supp. 605, wherein the court granted Summary Judgment to the defendant which was affirmed in 196 F. 2d 762:

> "All the plaintiff has in this case is the hope that on cross-examination * * * the defendants Sweeney and Gilbert will contradict their respective affidavits. This is purely speculative, and to permit trial on such basis would nullify the purpose of Rule 56 * * *"
>
> *Orvis v. Brickman,* 95 Fed. Supp. 605, 607.

In this case all the plaintiff has is the hope that somehow if he is allowed to go to trial, he will somehow be able to produce some evidence that something he may have done may have had some connection with the procurement of natural gas service.

It is respectively submitted that if Rule 56 is to have any effect, and if defendants are not to be forced through costly and prolonged litigation where the plaintiff has nothing more than hopeful speculation, that the judgment of the Trial Court should be affirmed.

All of which is respectfully submitted.

GIBSON, DUNN & CRUTCHER,
MARTIN E. WHELAN, JR.,
By MARTIN E. WHELAN, JR.,
Attorneys for Respondent American Potash & Chemical Co., Inc.